CASE NO. 57043-2 II

Division II of the court of Appeals

For the State of Washington

Armed Citizens' Legal Defense Network

v.

Office of Insurance Commissioner

Appeal Brief

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INTRODUCTION

The Armed Citizens Legal Defense Network ("the Network") fills a critical void—providing education and support to its members regarding lawful and justified self-defense. By providing these services, the Network makes society safer. As armed citizens become better educated in how to defend themselves and their loved ones responsibly, safely, and lawfully, the odds that tragedy may occur diminish.

Education does not end with the armed citizen. For justice to be realized, the justice system similarly needs to understand the laws and the facts that give rise to a claim of lawful self-defense. For this reason, the Network extends its educational mission beyond its members and to the lawyers, judges, and juries who must wield the levers of justice. It does so by offering, in its sole and plenary discretion, some financial legal assistance if one of its members finds herself enmeshed in legal proceedings related to an act of lawful self-defense.

Holding true to the adage "it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail,"[1] the Washington Office of the Insurance Commissioner ("Office of the Insurance Commissioner" or "Commissioner's Office") has deemed the Network's provision of assistance—even though discretionary—as constituting the sale of insurance under Washington law, and it has convinced the Superior Court below of the same. This cognitive bias is simply not true and is an error of law.

Network membership—and the potential assistance provided by the Network to its members—does not meet the definition of "insurance" in Washington. To be considered "insurance" in Washington, and therefore subject to the authority of the Office of the Insurance Commissioner, (1) there must be a

[1] Abraham Maslow, The Psychology of Science: A Reconnaissance, 15–16 (1966). "The political science analogue is that if there is a government agency, this proves something needs regulating." Yale Brozen, *Making Crises, Not Energy*, AEI (Apr. 6, 1980) https://www.aei.org/articles/making-crises-not-energy/.

contract; that (2) indemnifies another or; (3) pays a specified amount upon determinable contingencies. RCW § 48.01.040. Membership in the Network is not a contract for insurance because, among other things, the provision of assistance to members post-self-defense is discretionary and does not obligate the Network to do anything whatsoever. Moreover, lawful acts of self-defense are not determinable contingencies because self-defense requires a conscious and intentional act. Even if the Network exercises its discretion to provide financial assistance, no person ever receives a "specified amount," nor does the Network's financial assistance "indemnify."

The Superior Court erred as a matter of law and, in so doing, endangered an organization that provides an invaluable service to the public writ large and set a demonstrably incorrect precedent. Such a decision must be reversed.

ASSIGNMENTS OF ERROR

The Superior Court erred when it upheld the Office of the Insurance Commissioner's order.

ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

The Network provides its members with educational and financial resources regarding the lawful use of force (self-defense). If legal action follows a justifiable use of force, the Network, in its sole discretion, provides financial assistance to its members. The Office of the Insurance Commissioner determined that the provision of such financial assistance—even though discretionary—constitutes the sale of insurance under Washington law. The Superior Court agreed, upholding an order from the Commissioner imposing significant financial penalties on ACLDN for its failure to register as an insurance provider in Washington.

The issue before this Court is whether the Superior Court erred when it held that the Network sells insurance under Washington law.

STATEMENT OF THE CASE AND FACTS

I. IN 2008, THE ARMED CITIZENS LEGAL DEFENSE NETWORK BEGINS SERVING THE LAW-ABIDING CITIZENS OF WASHINGTON.

A. In 2008, Mr. Marty Hayes, JD, a nationally recognized self-defense expert with decades of firearms-training experience, founded the Armed Citizens Legal Defense Network. *See* Administrative Record ("AR") at 399, ¶ 2; 401, ¶ 11. Conceived during his time as a law student and informed by his aptitude in responsible gun possession, Mr. Hayes molded the Network around a self-evidently correct premise: if gun owners (1) understand the law of self-defense and (2) remain proficient in the skills necessary to lawfully use force should the need arise, then avoidable tragedy will diminish while public safety will amplify. Since it began operating, the Network has helped its over 19,000 members keep themselves and their loved ones safe and secure through this education.

Thirteen years later, education remains the Network's paramount objective, and its members are among some of the

best trained and most responsible armed civilians in the Nation. On the day they join, each member receives a 235-page self-defense book along with ten educational lectures on DVD. *See, e.g.*, AR at 258, 299, 403. Over the course of their membership, they have access to additional video lectures and interviews, as well as scores of journal articles that the Network updates every month. *Id*.

Collectively, the Network's leadership offers two centuries of lawful, responsible, civilian firearm expertise, which includes:

- Marty Hayes, who is the former Director of The Firearms Academy of Seattle, a law school graduate and expert witness in self-defense and firearms related legal cases, and the President of the Network;[2]
- Massad Ayoob, who is the former Director of the Lethal Force Institute in Concord, New Hampshire and now the Director of the Massad Ayoob Group instructing both police and civilians in self-defense for over 40

[2] *Get to Know the Network Leaders*, Armed Citizens Legal Defense Network, Inc., https://www.armedcitizensnetwork.org/learn/network-leadership (last visited Sept. 14, 2022).

years, and has often served as an expert witness in trials where self-defense concerns are addressed;[3]

- John Farnam, who is the current President of Defensive Training International and has trained many federal, state, and local law enforcement personnel in using firearms along with serving as an expert witness in firearms related court cases;[4]

- Marie D'Amico, who served twenty-one years as Deputy County Attorney for the Monroe County New York Law Department and often contributes litigation support to legal cases involving self-defense (including most recently in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), where the U.S. Supreme Court held that New York's proper-cause requirement for obtaining an unrestricted license to carry a concealed firearm violates the Fourteenth Amendment); [5]

- Tom Givens, who is the current owner and operator of Rangemaster Firearms Training

[3] Armed Citizens Legal Defense Network, Inc, https://www.armedcitizensnetwork.org/defensefund/advisory-board (last visited Sept. 14, 2022).

[4] *Id.*

[5] *Id.*

Services is an author and expert in self-defense cases;[6]

- Emanual Kapelsohn, JD, who is a certified shooting scene reconstructionist, has served as an expert witness in many cases involving self-defense and use of force, and has also provided legal services to federal agencies (including the U.S. Department of Justice) regarding immediate post-shooting incidents;[7]

- Karl Rehn, who, as owner of KR Training, has spent over thirty years teaching the use of firearms for self-defense and now works as an expert witness in self-defense;[8]

- Dennis Tueller, who is the author of "How Close is Too Close," an article which influenced the tactical training doctrine (which is now known as the "Tueller Principle").[9]

B. Given the complexity surrounding the ever-evolving self-defense legal landscape, the Network's educational mission extends beyond its primary task of ensuring that its members

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[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

grasp the who, what, when, where, why, and how of lawfully halting a reasonably perceived threat of death or grave bodily injury. The rule of law demands that the justice system adjudicate use-of-force incidents as either lawful or unlawful, and the Network's members understand and appreciate that. Naturally, though, they want the justice system to apply the law of self-defense correctly and fairly to the facts of every use-of-force incident. And to ensure that the justice system reaches correct and fair outcomes, those who function in it—many of whom have little-to-no real-world experience with use-of-force incidents—must develop a real-world understanding of reasonable threat perception and the level of force required to negate that threat.

The Network offers two solutions. The first is by acting as a conduit between its members and the professional self-defense legal community. These include lawyers throughout the Nation who specialize in use-of-force law as well as individuals renowned for their capacity and credibility as self-defense

experts. These lawyers and experts receive no money from the Network itself unless they are hired to work on a specific case. But by facilitating communication among the Network's legal cadre and the members who need their services, the Network's members benefit from state-of-the-art developments in both the law and science of use-of-force encounters and access to those best positioned to fairly and accurately explain this law and science to judges and juries.

C. The second is at issue here. Justice-system participation is neither cost-free nor cheap, and using force in an act of self-defense virtually guarantees justice-system scrutiny. For that reason, if one of the Network's members uses force to protect herself from a reasonably perceived threat of grave injury or death the Network *may*—not *shall*—provide some financial assistance to cover, among other things, bail, attorneys' fees, and expert-witness costs.

Every person who contemplates joining the Network immediately encounters the following disclaimer: "[W]e are

NOT insurance! There is no insurance component in our member benefits." AR at 407, ¶¶ 45–46; 443–47. The Network bellows this information to make crystal clear to its members that, unlike car insurance (which, so long as payments are made and deductibles are met, contractually guarantees that a third-party will cover the cost of most accidents), Network membership comes with no contractual rights at all to financial assistance if a member finds herself enmeshed in legal action following a use-of-force.

Network membership results in neither a "membership agreement" nor a document signed by both the member and the Network (or its representative). Before becoming a member of the Network, prospective members can receive a Membership Application Brochure ("Brochure"). AR at 219, 530. To become a member, prospective members must answer questions about any criminal history and pay a membership fee. *Id*. Once enrolled, members receive an Explanation of Membership Benefits ("Explanation"). *Id*.

Neither the language of the Brochure nor the Explanation forms a contract. Instead, the language highlights the discretionary nature of the assistance the Network may provide to its members. For example, the Brochure discusses what to expect before, during, and after a member engages in self-defense, providing some education but also describing the Network's benefits using discretionary language.[10] AR at 262 (emphasis added). The Explanation, received after membership is paid, similarly provides some educational language and describes the Network's benefits using discretionary language:

[10] For example, a previous version of the Brochure read: "Immediate funding: When a member uses force in self defense, the Network immediately sends *up to* $25,000 to the member's attorney and *can provide up to* $25,000 in bail assistance." AR at 262 (emphasis added). The brochure was changed to remove the "up to $25,000" language. This was done because the Network did not wish to make it appear that it limited potential financial assistance to any hard and fast dollar figure. The "up to" language not only evokes a discretionary—rather than contractual process—but also the fact that the Network was able to alter the language of its Brochure on its own accord, also evidences that discretionary interpretation.

The member is *eligible* for Network benefits from the time their dues payment is received to the end of their membership term . . .

. . . .

The Network never assigns an attorney to a member, nor interferes with the member's attorney choice.

. . . .

If a Network member who has been involved in a self-defense incident requests the Network's assistance, the Network will work with the member to identify a local attorney to provide representation. *The member retains final responsibility in the selection of the attorney representing him or her*.

. . . .

Network assistance with legal fees is not limited to Network Affiliated Attorneys, so if your preferred attorney is not affiliated with the Network, that does not affect your eligibility to receive assistance with fees.

. . . .

. . . your representative *should* call us at the Network office . . . to *request* this assistance.

. . . .

. . . *please* do not call [the emergency Network number] for any reason other than a *request* for legal assistance after a self-defense incident.

. . . .

> If criminal charges or other litigation results from the self-defense incident, the member and his or her attorney *can request* a grant of further financial assistance from the Network to defray the cost of going to trial.

AR at 264–65 (emphases added). The Network's webpage contains similarly discretionary language throughout.[11] *See, e.g.*, AR at 226. "Can," "eligible," "up to," "should," "request," and similar language all exude discretion. For example, the phrase "up to" implies that the Network can decide to pay a fraction of a member's legal expenses, or pay for no expenses at all. The word "can" implies the discretion to choose to take no action

[11] A previous version of the Network's FAQ webpage, which was altered prior to the Office of the Insurance Commissioner action against the network stated: "What does my membership fee buy me? An initial fee deposit of *up to* $25,000 paid to the member's attorney by the Network if the member has been involved in a self-defense incident. . . The Network will pay a bail bond agent *up to* $25,000 to post bail on behalf of a member who has used force in self defense." Similar to the Brochure, this language was altered to remove the appearance that the Network placed a cap on its potential assistance to members. The "up to" language not only evokes a discretionary—rather than contractual process—but also the fact that the Network was able to alter the language of its webpage on its own accord also evidences that discretionary interpretation.

whatsoever. The word "should" does not imply a binding agreement, and "request" implies an ability on the part of the requestee (here, the Network) to deny the request.

Understanding how a member might receive legal-cost-defrayment clarifies that legal-cost-defrayment remains solely in the Network's plenary discretion. If a member encounters legal action after she uses self-defense, she may contact the Network to ask for financial assistance. Requests are then reviewed by at least one member of the Network's Advisory Board, which includes the seven individuals listed above. *See supra* at p. 8. The facts and the most up-to-date law are considered. The former is applied to the latter to determine whether the member reasonably perceived that she was in imminent danger of bodily injury or death from a person with the ability, opportunity, and intent to carry out the threat, and then whether the member used the appropriate force—and no more—to end the threat.

If it is determined that the member did not act justifiably in self-defense, that member receives no financial support. There

is no appeal from a negative determination. Throughout the Network's entire lifespan, not one person has ever sued, or even hinted at suing, to force the Network to provide financial assistance despite the network turning down eight legal-cost-defrayment requests.

If the Network's Advisory Board concludes that the member acted lawfully, it *may*—again, in its sole and plenary discretion—provide some indeterminate amount of financial legal support.[12] Unlike car insurance, which typically contractually obligates the insurer to cover (subject to policy limits) the total cost of damage suffered in a collision, the Advisory Board's conclusion that (1) a member justifiably acted in self-defense and (2) the Network will provide some financial support, does *not* mean that the Network will fund all attorneys' fees or cover the entire cost of an expert witness. The Network

[12] *See, e.g.*, AR at 650, ¶ 5 (R. Hamilton Decl.) ("When I became a member, I was fully aware that [the Network] retain [sic] full discretion to provide a member access to and receive financial assistance from [the] Fund."); *accord* AR at 684–705 (14 others).

has never hinted that it will pay a criminal fine, an order of restitution, or a damage's verdict imposed against one of its members.

The Network does not indemnify its members in any sense of the word. This remains true even if the Network concludes that a member lawfully exercised her right to defend herself or another innocent person. The Network *never* promises assistance, and it *never* promises that, should it assist, it will make a member financially whole. In other words, any decision by the Network to assist a member is fully *discretionary* and is under no obligation, contractual or otherwise, to do anything.

None of this is a secret. The Network clarifies to its members how its financial-assistance regime works—i.e., that financial assistance remains solely and entirely within the Network's discretion. Its members, in turn, understand how the Network's discretionary financial-assistance program differs from their car, homeowner, and medical insurance. *See, e.g.*, AR at 650, ¶ 5 (R. Hamilton Decl.) ("When I became a member, I

was fully aware that [the Network] retain full discretion to provide a member access to and receive financial assistance from [the] Fund."); *accord* AR at 684–705 (14 others). As for the former, the Network has repeatedly and publicly discussed the differences between it and insurance schemes in messages to its members and to the public,[13] with its president stating that "we are not interested in combining our established and workable

[13] *See, e.g*, *President's Message*, Armed Citizens Legal Defense Network, Inc., https://armedcitizensnetwork.org/june-2015-presidents-message (June 2015); *id.* https://armedcitizensnetwork.org/our-journal/archived-journals/286-may-2013#President (May 2013); *Editor's Notebook*, Armed Citizens Legal Defense Network, Inc., https://armedcitizensnetwork.org/february-2018-editorial (Feb. 2018);

https://armedcitizensnetwork.org/september-2018-editorial; https://armedcitizensnetwork.org/march-2019-editorial; https://armedcitizensnetwork.org/july-2018-presidents-message; https://armedcitizensnetwork.org/december-2018-presidents-message; https://armedcitizensnetwork.org/february-2019-presidents-message; https://armedcitizensnetwork.org/august-2019-presidents-message; https://armedcitizensnetwork.org/2018-state-of-the-network; https://armedcitizensnetwork.org/july-2017-book-review; https://armedcitizensnetwork.org/october-2017-presidents-message; https://armedcitizensnetwork.org/1-million-legal-defense-fund.

program to protect our members from criminal prosecution with any insurance product. . . . [and] I don't want anything to do with [insurance]."[14] And regarding the latter, more than a dozen members submitted declarations in the proceedings below stating that they remain "fully aware" that the Network "retain[s] full discretion to provide a member access to and receive financial assistance," and that "[a]t no time did" they "think or believe that [the Network] was providing me . . . insurance or contractual obligation to have access to" financial assistance. AR at 95, ¶ 29.

The financial resources making up the Fund come from various sources—not merely membership dues. *Id.* 404–05, ¶ 29. Many Fund donations come from corporate entities or individuals who make direct financial contributions or donate product and services then auctioned, with the proceeds added to

[14] *President's Message*, Armed Citizens Legal Defense Network, Inc., https://armedcitizensnetwork.org/february-2018-editorialhttps://armedcitizensnetwork.org/our-journal/archived-journals/286-may-2013#President (Feb. 2018).

the Fund. *Id.* Other Fund donations come from bequests from estates. *Id.* Since the initiation of the action by the Commissioner's Office, 220 individuals have donated over $21,000 to the Network. Only twenty-five percent of Network membership dues are paid into the Fund, an amount that can unilaterally change at any time at the discretion of Network leadership. *Id*. Along with membership dues, the Network provides additional donations to the Fund. *Id.*; AR at 404–05, ¶ 29.

II. IN 2020, THE WASHINGTON OFFICE OF THE INSURANCE COMMISSIONER DECREES THAT THE NETWORK IS ENGAGED IN THE UNAUTHORIZED PRACTICE OF INSURANCE AND ISSUES A CEASE-AND-DESIST ORDER.

For 11 years, the Network faithfully lived out its vocation of making society safer by training and educating armed citizens throughout the United States. Its service continued without incident until April 2019, when it received a notice of investigation from the Commissioner's Office. The notice stated, *among other things*, that the Commissioner's Office "has opened

an investigation based on the allegation that [the Network] is insuring business in Washington without being authorized by a certificate of authority issued by the commissioner." AR at 239.

From there, things devolved rapidly. Two months after it issued its Notice of Investigation, the Commissioner's Office served the Network with a subpoena demanding, among other things, member identities and bank records. *Id.* at 206–07, 209–12. Despite the Network's position that the Commissioner's Office has no authority to issue a pre-suit subpoena, the Network complied.[15] After another eight months elapsed, the Commissioner's Office issued a Cease and Desist Order, which prohibited the Network from selling memberships in the State of Washington. AR at 130–34 (Order No. 20-0257). A Demand for Hearing Presided Over by Administrative Law Judge followed

[15] The subpoena remains a point of contention. Although not material to this appeal, the Network maintains that the Commissioner's Office had no authority to issue the subpoena outside of litigation.

that same month. AR at 139–43.[16] Roughly two-months after that, the Commissioner's Office issued an Order Imposing a Fine of $200,000.

Faced with a colossal financial threat, the Network responded with a Motion to Stay the Order to Cease and Desist pending the administrative hearing process. *Id.* at 196–207. Among other things, the Network argued that fundamental notions of due process required, at a minimum, notice and an opportunity to be heard before the Commissioner's Office fined it into financial oblivion. The presiding officer denied the motion, reasoning that she lacked authority to rule on federal constitutional issues. *Id.* at 351–70.

In August 2020, the parties cross-moved for summary judgment. *Id.* at 374–98, 527–42. A month later, the presiding

[16] To ensure that it would get an impartial and fair audience, the Network filed a request to transfer the proceedings to an administrative law judge at the Office of Administrative Hearings. The presiding officer at the Commissioner's Office denied the request.

officer granted the motion filed by the Commissioner's Office and denied the Network's. She concluded that membership in the Network constituted a contract for insurance because, in her view, the Network "promised" to pay legal costs if a member acted in self-defense; that acting in self-defense constitutes a "determinable contingency"; and that a member engages in "risk shifting" or "risk distribution" of a member's risk upon buying a membership. *Id.* at 100–13.

On October 5, 2020, the Network moved for reconsideration. *Id.* at 728–32. In early November, the presiding officer granted it in part, but only to redefine self-defense as both an intentional act and a "hybrid contingent act." Although she reduced the fine to $50,000, she refused to change her bottom-line conclusion that the Network was selling insurance.

III. ON APPEAL FROM THE INSURANCE COMMISSION, THE LEWIS COUNTY SUPERIOR COURT CONCLUDED THAT THE NETWORK IS PROVIDING INSURANCE.

Having exhausted its administrative remedies, the Network filed a Petition in Support of Judicial Review with the

Lewis Country Superior Court on March 23, 2022. In it, the Network argued that it was not providing insurance because (1) Network membership does not contractually obligate it to indemnify its members, (2) risk never shifts from members to the Network, (3) it retains absolute discretion whether to provide financial assistance, and (4) acting in self-defense cannot be construed as a determinable contingency.

The Superior Court disagreed, and on May 25, 2022, it affirmed the order entered by the Commissioner's Office.[17] Court's Memorandum Decision Affirming Commissioner's Final Order (hereinafter, "Memo Decision"), *In the Matter of Armed Citizens' Legal Defense Network v. Office of the Insurance Comm'r*, at 3 (May 5, 2022) (No. 20-2-00723-21). Specifically,

[17] To lawfully sell insurance in the state of Washington, a business is required to obtain an insurance producer license and the business must: pay appropriate fees, have a designated licensed insurance producer responsible for compliance with Washington insurance laws, and show that it has not committed any act that could be seen as grounds for disapproval as laid out in the statute. RCW § 48.17.090(3).

the Superior Court held that the Network sold insurance contracts to its members because it had accepted fees in exchange for, among other things, the payment of legal expenses and bail expenses if a member faces the justice system after a lawful use-of-force incident. *Id*.

This appeal followed.

SUMMARY OF THE ARGUMENT

Washington Law defines "Insurance" as "a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies." RCW § 48.01.040. The Commissioner's Office found that the membership in the Network satisfied these criteria, and the Superior Court agreed. Both erred profoundly.

First, and most fundamentally, membership in the Network cannot be considered a contract for insurance because membership in the Network entitles no member (contractually or otherwise) to financial assistance if she uses force in an act of self-defense (lawfully or otherwise). Like most jurisdictions,

contracts require "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." *Pope Res., LP v. Certain Underwriters at Lloyd's of London*, 19 Wash. App. 2d 113, 141 n.150 (2021) (citing Restatement (Second) of Contracts § 1 (Am. Law Inst. 1981)). The Network takes pains to make sure that every member understands that it never promises to provide its members with any financial assistance at all, but it will consider whether to exercise its sole and absolute discretion to do so. Dozens of members filed declarations explaining that they understand this, and since the Network began operating in 2008, not one member has ever demanded financial assistance when the Network declined to provide it.

Second, a lawful act of self-defense—*i.e.*, the sole reason the Network may exercise its discretion to provide financial assistance to one of its members—is not a determinable contingency. A determinable contingency is a chance event that might (or might not) occur but that can be determined. *See infra*

at Sec. I. To be lawful, however, self-defense requires a conscious, intentional act to use force premised on a person's conclusion that, given what she knows in that moment, she is facing an imminent threat of death or grave bodily injury by a person with the intent and ability to deliver on that threat. Each conclusion must be reasonably and rationally reached, and the decision to meet that threat with a proportional level of force remains in the intentional control of the person lawfully defending herself or another innocent person.

Finally, even if the Network exercises its discretion to provide financial assistance, no person ever receives a "specified amount," and the Network's financial assistance is a far cry from "indemnification," which is the reimbursement for a loss suffered because of a third party's act. What the Network *might* do is elect to cover *some* costs—*e.g.*, bail, attorneys' fees, or expert retention. Attorneys' fees and expert-retention costs in particular are largely optional—members can elect which lawyer or expert they want to assist them, so the costs that the Network

may choose to defray (or defray in part) are derived by the member's discretion. This is qualitatively different from an insurance contract, which guarantees reimbursement for things like, for example, medical expenses after a car accident or repairs after a home is damages in a fire.

The Superior Court erred, and erred badly, when it concluded that the Network provides insurance contracts for its members.[18] This Court should right that wrong. A reversal is warranted.

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[18] In reviewing the decision of the Superior Court, which was in turn reviewing a decision of an agency, this Court sits "in the same position as the superior court." *Montlake Cmty. Club v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 43 P.3d 57, 59 (Wash. App. 2002) (citing *N.W. Steelhead v. Dep't of Fisheries*, 896 P.2d 1292, 1296 (Wash. App. 1995)). Legal conclusions are reviewed de novo to "determine whether the review judge correctly applied the law, including whether the factual findings support the legal conclusions." *Hardee v. Dep't of Soc. & Health Servs.*, 215 P.3d 214, 217 (Wash. App. 2009) (citing *Timberlane Mobile Home Park v. Human Rights Comm'n*, 95 P.3d 1288 (Wash. App. 2004)). And, "[c]onstitutional challenges are questions of law subject to de novo review." *Amunrud v. Bd. of Appeals*, 143 P.3d 571, 574 (Wash. App. 2006) (citing de *City of Redmond v. Moore*, 91 P.3d 875, 878 (Wash. App. 2004).

ARGUMENT

I. UNDER WASHINGTON LAW, AN ENTITY DOES NOT PROVIDE INSURANCE UNLESS IT CONTRACTS TO "INDEMNIFY" ITS EMBERS OR "PAY A SPECIFIED AMOUNT" UPON A "DETERMINABLE CONTINGENCY."

This case turns on the definition of insurance under Washington law, which, according to Section 48.01.040 of the Revised Code of Washington, is:

(1) "a contract";

(2) "whereby one undertakes to indemnify another or pay a specified amount";

(3) "upon determinable contingencies."

Although the nuances of each prong remain somewhat underdeveloped by precedent within the State, Washington's statutory definition largely tracks that of other jurisdictions. The Ninth Circuit, for instance, has interpreted "insurance" to mean "a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, prejudice, or damage by the happening of the perils specified to certain things which may be

exposed to them." *Physicians' Def. Co. v. Cooper*, 199 F. 576, 579 (9th Cir. 1912).[19]

Courts will assess the specific language in an agreement or plan to determine whether the parties intended to contract for insurance. For example, in *Jackson v. Aliera Cos.*, the Western District of Washington concluded that an agreement constituted insurance under Section 48.01.040 where it provided that (1) monthly contributions into a plan were marketed as "premiums," (2) those "premiums" were offered at different levels depending on the coverage desired, (3) each plan required members to pay deductibles before their medical costs were reimbursed, and (4) a guide, much like a conventional health-insurance benefits booklet, was provided that showed how the

[19] *See also Babcock v. ING Life Ins. & Annuity Co.*, No. 12-CV-5093-TOR, 2013 U.S. Dist. LEXIS 1035, at *25 (E.D. Wash. Jan. 2, 2013) ("[A]n insurance contract, as cited by Babcock, include (1) an insurer, (2) consideration, (3) a beneficiary, and (4) a hazard or peril insured against." (citing *State v. Universal Service Agency*, 87 Wash. 413, 424 (1915)).

plan tracked "traditional health insurance." 462 F. Supp. 3d 1129, 1135–36 (W.D. Wash. 2020).[20]

Courts, however, do not reflexively categorize agreements as insurance contracts, nor do they err on the side of concluding that. Indeed, the Western District of Washington has held that Health Maintenance Organizations are *not* insurers because they do not satisfy Section 48.01.040. *Wash. Physicians Serv. Ass'n v. Gregoire*, 967 F. Supp. 424, 428 (W.D. Wash. 1997), *rev'd on other grounds*, 147 F.3d 1039, 1043 (9th Cir. 1998). The Court concluded this because insurers indemnify insured individuals while HMOs do not. Instead, "HMOs provide health care services" that are "rendered directly by the health maintenance organizations or by [a] provider [that] has a contract or other arrangement with the health maintenance organization to render health services to enrolled participants." *Id.*

[20] *See also Pub. Emps. Mut. Ins. Co. v. Mucklestone*, 758 P.2d 987, 988 (Wash. 1988) ("The state tort claims revolving fund is not 'insurance' because it is not a contract of indemnity.").

In other words, courts take seriously the definition of "insurance" in the Washington code. And they are right to do so. Where, as here, a court interprets the definition of insurance in a plainly overinclusive way, organizations like the Network that help their members and increase the safety of *all* law-abiding members of society get shuttered.

II. ACLDN'S PROVISION OF MONETARY SUPPORT SATISFIES NONE OF THE ELEMENTS TO CONSTITUTE INSURANCE.

Faithfully applying the statutory definition of insurance illustrates how badly the Superior Court erred when it approved the tactics used by the Commissioner's Office. The Commissioner's Office did not, and cannot, show that any of the three insurance-contract elements set out above are satisfied. No member has a contractual right to financial assistance if she engages in lawful self-defense. If any member did, the financial assistance is neither indemnity nor for a specified amount. And even if it were, it is not triggered by a determinable contingency.

This Court should reverse.

A. Because the Network retains absolute discretion to provide financial assistance, it does not contract with its members to provide insurance.

Washington law confirms a commonsensical premise that craters the argument that the Network provides insurance. An insurance contract cannot exist absent a contract. *See* RCW § 48.01.040; *Physicians' Def. Co.*, 199 F. at 579–80. Although rudimentary logic dictates this must be true, this Court has removed any lingering doubt by holding that "[i]t is the contractual nature of the undertaking that determines the insurer status." *Wash. Ins. Guar. Ass'n ex rel. Bloch v. Dep't of Lab. & Indus.*, 859 P.2d 592, 595 (Wash. 1993). Even the Superior Court got this much right when it concluded that "[t]he first element of RCW [§] 48.01.040 requires that a contract must exist." Memo Decision at 2.

From that foundational premise follows the problem for the Commissioner's Office. As every law student learns within a few days of cracking a textbook, "'[a] contract is a legally enforceable promise or set of promises.'" *Pope Res., LP*, 19

Wash. App. 2d at 141 (2021) (quoting 6 Washington Practice: Washington Pattern Jury Instructions: Civil 301.01, at 163 (7th ed. 2019)). Legally enforceable means that "the law gives a remedy" if a party breaks one of its promises, and the performance of those promises are "recognize[d]" by the law "as a duty." *Id*. at n.150 (citing Restatement (Second) of Contracts § 1 (Am. Law Inst. 1981)).

The question, then, is whether the Network made a legally enforceable promise with anyone to provide financial assistance to her if she engaged in a lawful act of self-defense.[21] Plainly, it has not. It remains blackletter law in this State (and all others for which the undersigned is aware) that if one party to an agreement retains absolute discretion to perform or not perform, no contract has arisen because the decision not to perform provides no

[21] As discussed below, even if the Network had entered into a legally enforceable agreement to provide financial assistance if a member engages in a lawful self-defense act (and to be sure, it never did), it would still not satisfy the definition of insurance as set out in the Washington Code.

legally enforceable remedy. In other words, "[i]f the provisions of an agreement leave[s] the promisor's performance entirely within his discretion and control, the 'promise' is illusory," because "[w]here there is an absolute right not to perform at all, there is an absence of consideration." *Felice v. Clausen*, 590 P.2d 1283, 1285 (Wash. App. 1979).[22]

[22] *See also Wharf Rest. v. Port of Seattle*, 24 Wash. App. 601, 609 (1979) ("A supposed promise is illusory when it is so indefinite that it cannot be enforced, or where . . . its provisions are such as to make its performance optional or entirely discretionary on the part of the claimed promissor."); *SAK & Assocs. v. Ferguson Constr., Inc.*, 189 Wash. App. 405, 412 n.17 (2015) (citing *Omni Grp., Inc. v. Seattle-First Nat'l Bank*, 645 P.2d 727, 729 (Wash. App. 1982)). "Washington courts 'will not give effect to interpretations that would render contract obligations illusory.'" *Id*. at n.18 (quoting *Taylor v. Shigaki*, 930 P.2d 340, 344 (Wash. App. 1997)); *see also, e.g, Drobny v. The Boeing Co.*, 80 Wash. App. 97, 103 (1995) ("[I]n the absence of a written policy providing promises of specific treatment in specific situations, oral representations by an employee's supervisor are insufficient to establish an enforceable promise."); *Hill v. J. C. Penney, Inc*., 852 P.2d 1111, 1117 (Wash. App. 1993) (opining that an employee manual not explaining or promising any discharge procedures cannot form basis of implied contract), *review denied*, 866 P.2d 39 (1993).

Under this blackletter law, no contract for any financial assistance at all exists between the Network and any of its members. Even if the Network's Advisory Board concludes that a member's use of force was lawful, the Network may still decline to provide any financial assistance at all and nothing in the membership agreement remotely suggests that a member could walk into court and sue to force it to do so. Dozens of members submitted declarations confirming that they understand this. Not one member since the Network began operation has ever argued otherwise. And the Commissioner's Office has submitted nothing at all to dispute this.

The Superior Court's error on this issue resulted from an overly cursory examination of what the Network's membership agreement provides. In fact, it spent only two sentences on the question. With no meaningful analysis at all, the Superior Court summarily concluded that "[t]he advertising, website and explanation of benefits constitute an offer that is accepted by the member when they give consideration by paying the membership

fee." *Id*. What the court below failed to do was consider which legally enforceable rights a member gained by paying a fee, and which legally enforceable duties the Network undertook by accepting a fee.

Had a member sued to secure her self-defense book, or access to the Network's monthly newsletter and journal archive, she may have a claim sounding in contract. Paying membership fees obligates the Network to provide those services, and upon receipt of those fees, the Network has no legally defensible right to withhold those benefits. In contrast, every member is made well aware that no member has any right to demand that the Network provide financial assistance if a member uses force in self-defense, no matter how justifiable the Network finds the use of force to be. This unassailable conclusion compels reversal of the Superior Court's order.

B. Even if the Network elects to provide monetary support, that monetary support constitutes neither indemnification nor an agreement to pay a set amount.

Even if a contract for financial assistance arose between the Network and its members (and it did not), that agreement would not fit the definition of an insurance contract. To satisfy the definition, the financial assistance must constitute either indemnification or an agreement to pay a set amount. It does neither.

1. Indemnification remains the predominant basis for most insurance contracts (save for life insurance). *McCarty v. King Cnty. Medical Serv. Corp.*, 175 P.2d 653, 666 (Wash. 1946) (quoting *Physicians Def. Co. v. O-Brien*, 100 Minn. 490 (1907)). Black's Law Dictionary, in turn, defines "[i]ndemnification" as either (1) reimbursement for a loss suffered because of a third party's act or default, (2) a promise to reimburse another for such a loss, or (3) to give another security against such a loss. *Indemnification*, Black's Law Dictionary (7th ed. 1999). In other

words, "[i]ndemnity" refers to the amount of compensation necessary to reimburse an insured's loss. 1 New Appleman on Insurance Law Library Edition § 1.05[4]. In simpler terms, an agreement to indemnify means that when an insured suffers a loss, the indemnifier makes the insured whole. *Id.*

The financial assistance that the Network may provide, in its absolute discretion, does not constitute indemnification. To begin, indemnification is money paid to cover a loss, and the money spent to, e.g., hire a proficient self-defense attorney or a credible expert witness is not money covering a "loss" in any sense of the word. And given the discretion that a member has in choosing her lawyer or expert, these fees are not triggered by a third-party's act.

Most fundamentally, though, the Network's decision to provide funds is not premised on covering a "loss" suffered by a member. Distilled to its essence, the Network's discretionary decision to provide funds is based on its belief that justice needs to be done when lawful use of force is used, and in some cases,

providing financial assistance is the best way to ensure that a judge or jury receives the tutelage its needs to understand why, given the circumstances known at the time, a law-abiding citizen decided to protect herself, and why the judge or jury would have made the same choice in those circumstances.

That isn't indemnity. Nor is it a financial benefit provided solely to the person who acted in self-defense. It is, instead, a service that the Network may elect to provide so individuals serving in the justice system have the information necessary to ensure that justice is meted out fairly and accurately. Thankfully, many judges and juries have never had to make the decision to meet deadly force with deadly force, even though the law allows it. When the Network concludes that it can help the justice system see that the law allowed the use of force in a particular situation, it may act to ensure that the right lawyers and experts explain why an act of force was lawful. To lump the Network's discretion to provide financial resources in the same category as roof repairs after a bad storm is profoundly wrong.

2. Similarly, the Network never agrees to pay a "specified amount." RCW § 48.01.040. "Specified," in common parlance, means "to name or state explicitly or in detail." *Specified*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/specified (last visited Sept. 14, 2022),[23] while "amount" means "the total number or quantity: AGGREGATE [or] the quantity at hand or under consideration," *Amount*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/amount (last visited Sept. 14, 2022). Put together, an agreement to pay a "specified amount" means an agreement to provide an exact or total figure.

The Network's discretionary provision of financial resources cannot be construed as an agreement to provide "a specified amount" in any sense of that phrase. As noted above, legal fees in self-defense cases often exceed hundreds of

[23] *See also* American Heritage ("To state explicitly or in detail: *specified the amount needed*") https://ahdictionary.com/word/search.html?q=specified&submit.x=43&submit.y=6.

thousands of dollars; bail alone in a use-of-force case can be upwards of $5,000 in the State of Washington.[24] In the twenty-nine occasions since 2008 that the Network provided funds to one of its members, it never paid more than $75,000.

The Network currently offers no specification as to how much or how little it will provide if it exercises its discretion to help a member in need. In other words, the Network makes no representations at all as to the amount of help it may elect to provide. For this reason, it does not agree to pay a "set amount."

The Superior Court disagreed because, at one point, the Network advertised that it may elect to furnish "up to $25,000." In typical insurance agreements, "up to" a set amount contractually obligates an insurance company to defray any cost *below* that amount (e.g., if a car insurance company agrees to pay "up to $500,000" in property damage, it will foot the entire bill if a car accident results in $300,000 in property damage). But

[24] WashingtonCourt https://www.courts.wa.gov/newsinfo/content/pdf/Bail_Schedule.pdf (last visited Sept. 14, 2022).

here, even though the Network once said it would pay "up to $25,000," it always had discretion to settle on the amount it would pay (e.g., if a member incurred a $20,000 legal expense, the Network may still elect to defray only $10,000 of that cost) or do nothing, including pay no amount at all.

The Superior Court similarly erred when it concluded that "offering to pay a 'legal expense' or a 'bail expense' is a specified amount . . . , although not limited by a dollar amount." The court below cited nothing for this conclusion, and the Network doubts it could. Specified "amount" is not synonymous with specified "event" unless an event has a uniform cost associated with it, and a legal cost associated with a use of force might range from a few hundred to a few million dollars. And even if the Court were to construe a "specified amount" as a "specified event," which it should not, the Network has never agreed to pay all of a member's bail or legal expense. Even if the Network has exercised its discretion to provide some financial

assistance, nothing in its membership agreement ties its hands to paying any "specified amount."

Assuming that the Network has contracted to cover its members legal costs (and, it has not, *see generally supra*), the Network does not indemnify its members. Similarly, it has never agreed to pay any specified amount. The Superior Court's contrary conclusion contradicts binding precedent, the plain meaning of the operative statutory terms, or logic. This Court should reverse.

C. Use of force in lawful self-defense is not a "determinable contingency."

Finally, even assuming the Network contracted with its members to provide a specified amount of financial assistance (it did not), Network membership *still* does not constitute an insurance contract. This is so because the lawful use of force in self-defense is not, nor can it be construed as, a "determinable contingency."

Meriam Webster defines "determinable" as "capable of being determined, definitely ascertained, or decided upon," *Determinable*, Merriam-Webster.com https://www.merriam-webster.com/dictionary/determinable (last visited Sept. 14, 2022), and "contingency" as "a contingent event or condition[,] such as an event ([like] an emergency) that may but is not certain to occur [or] something liable to happen as an adjunct to or result of something else," *Contingency*, Merriam-Webster.com https://www.merriam-webster.com/dictionary/contingency (last visited Sept. 14, 2022).[25]

For its part, the Washington Supreme Court has acknowledged that, for insurance purposes, "contingency" implies dependency on chance.[26] Indeed, "[o]ne of the

[25] Black's Law Dictionary defines "contingency" as: "An event that may or may not occur; a possibility. 2. The condition of being dependent upon chance, uncertainty." *Contingency*, Black's Law Dictionary (7th ed. 1999).

[26] *See also Universal Serv. Agency*, 87 Wash. at 424 (including as part of the definition of an insurance contract "a hazard or peril insured against whereby the insured or his beneficiary may suffer

fundamental assumptions deeply embedded in insurance law is the principle that an insurer will not pay for a loss unless the loss is 'fortuitous,'" which means that "the loss must be accidental in some sense." 1 Appleman on Insurance Law Library Edition § 1.05, citing *Westfield Ins. Co. v. Chico*, 2016 U.S. Dist. LEXIS 117175 (N.D.W. Va 2016); *see generally Delgado v. Interinsurance Exch. Of Auto. Club*, 211 P.3d 1083 (Cal. 2009); *Waller v. Truck Ins. Exch.*, 900 P.2d 619, 626 (Cal. 1995). "The public policy underlying the fortuity requirement is so strong that if the insurance policy itself does not expressly require that the loss be accidental courts should imply such a requirement." *Id*.

It bears reiterating what costs the Network may (in its discretion) elect to provide its members. If, and only if, the Network's Advisory Board concludes that one of its members

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loss or injury"); 1 ERIC MILLS HOLMES & MARK S. RHODES, HOLMES'S APPLEMAN ON INSURANCE, 2D § 1.3, at 13 (1996) ("An insurance agreement is an aleatory contract. Aleatory is derived from the Latin 'alea' meaning dice. An insurer's promise is conditioned upon the occurrence of an uncertain, fortuitous event, that is, a chance event."). *Id*. at 669.

lawfully used force to defend herself, it may help defray some of the *legal* costs that result directly from the member's *conscious, intentional* choice to lawfully use that force. The costs the Network might cover are not attributable to unlawful actions of a third party that the member used lawful force against; for instance, the Network will not cover a member's medical expenses if she is injured by a criminal attack.

Understanding this distinction brings into focus the Superior Court error: concluding that the Network's decision to defray a member's legal costs turns on a determinable contingency. So too, does appreciating what it takes for defensive use of force to be considered lawful in Washington State. Two statutes, along with interpretive caselaw, provide the clarification that nothing about lawful self-defense is determinable.

First, Washington law defines justifiable homicide (i.e., lawful self-defense use of deadly force), as homicide committed either:

> (1) [W]hen there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or
>
> (2) In the actual resistance of an attempt to commit a felony upon the slayer, in his or her presence, or upon or in a dwelling, or other place of abode, in which he or she is.

RCW § 9A.16.050. In other words, a person lawfully deploying lethal force in self-defense must assess the situation; reasonably conclude that she is in imminent risk of death or great personal injury from someone with the intent and the ability to kill or gravely injure; act with force proportional to the threat imposed; and then cease using force once the threat has dissipated. Each step requires a conscious, deliberate, and intentional choice, and failure to satisfy *any* step means that the use of force is not lawful

(and the Network will cover none of the legal costs associated with that use of force).

The same is true with lesser, non-lethal self-defense uses of force. If a member encounters a threat short of death or grave personal injury, she may use force if she is "about to be injured" or "to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession," so long as "the force is not more than is necessary." RCW § 9A.16.020(3). In other words, to be lawful, use of non-lethal force in self-defense must involve an assessment of the threat and a choice of force proportionate to that threat. Such an assessment is necessarily a conscious act, and the resulting self-defense action is necessarily intentional. If it is neither, then it is *not* lawful, and the Network will not choose to provide any financial assistance based on it.

Courts, including those of this State, have universally recognized these principles. In 2005, for instance, the Washington Supreme Court reiterated that "[j]ustifiable

homicide, and indeed all self-defense, is unmistakably rooted in the principle of necessity," and that "[d]eadly force is only necessary where its use is *objectively reasonable*, considering the facts and circumstances as they were understood by the defendant at the time." *State v. Brightman*, 122 P.3d 150, 158 (Wash. 2005) (emphasis added). In that case, the Court reiterated that at least four previous cases had recognized that "justifiable homicide" requires "an *individualized determination* of necessity." *Id.* (emphasis added).

The Network's mission is premised on the notion that self-defense is an intentional act, and that, with the right education and training, people exercise their right to self-defense responsibly and safely. In the Network's view, everyone in society will be safer if armed citizens are better equipped to make *correct* assessments under life-threatening scenarios and *intentionally choose* to deploy deadly force *only* when they have reasonably concluded that doing so is the only option left to prevent death or grave bodily injury to themselves or an innocent

person. The Network's decision to defray some legal costs is not, as the Commissioner's Office would have it, geared towards covering a member's losses after a bullet is fired or a knife is wielded. It is exercised only when the Network believes it necessary so a judge or jury can understand why one of its members consciously and reasonably assessed a threat, and why its member's intentional act to use force (deadly or otherwise) was a lawful act.

Based on the above, it's plain that the Network does not exercise its discretion to provide funds based on a "determinable contingency." Instead, the Network may elect to provide funds based on its assessment that one of its members *intentionally chose* to deploy force in a lawful manner. This is not a regime where, e.g., the Network will pay for a member's medical costs that result from a violent attack. Every dime that the Network may elect to disperse is keyed directly to the *choice* of the member; not that of a third-party or other circumstances out of the member's control.

Conflating the act of a violent offender with the act of a self-defender is where the Superior Court went astray. Doing so led it to conclude that self-defense is some amalgamation intentional acts and chance occurrences. The key to understanding the Superior Court's error lies in understanding (1) what the Network might choose to pay for (i.e., legal costs triggered solely by a member's decision to lawfully act in self-defense) and (2) and what it won't (i.e., losses incurred by the circumstances out of the member's control). The Network offers no financial resources for losses caused by a third-party; instead, whatever resources it may choose to provide are dependent entirely on the conscious choices made and the intentional actions undertaken by the member who chose to protect herself.

Acting in lawful self-defense is simply not "determinable." Concluding otherwise was reversible error. This Court should decide accordingly.[27]

III. THE COMMISSIONER HAS VIOLATED THE NETWORK'S DUE-PROCESS RIGHTS.

If this Court were to conclude that membership in the Network somehow constitutes insurance in Washington (and for all these reasons, it should not), it then follows that Washington's laws are so vague that persons of common intelligence must guess at their meaning. This renders them unconstitutionally vague.

[27] Similarly, Network membership fails all elements of the Substantial Control Test: (1) there is no articulable insurable interest (like loss to property); (2) the member is not subject to risk by a fortuitous peril, as self-defense is an intentional act and not fortuitous; (3) Network does not assume the risk, as there is no promise to "coverage" or access to the Funds, such access is fully discretionary by Network; (4) the Fund is not just funded by Network member dues but from four other funding sources; (5) there is no promise, thus no consideration for assumption of risk, and the membership benefit provides direct access to educational materials and experts.

A law that describes a crime or violation in vague terms (imposing limits without notice) raises due process issues because of the potential chilling effect on protected rights. The United States Supreme Court has held that a law is unconstitutionally vague when people "of common intelligence must necessarily guess at its meaning." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). If a regulation is too vague and potentially imposes limits without notice, it creates substantial problems under the due process clause of the Fourteenth Amendment.

Here, the Network has been targeted and fined under a statute never interpreted in this way against this kind of organization offering this type of membership. There is simply no way that the Network, its members, or anyone else could have guessed that the Network's membership benefits qualify as insurance. The novelty of the Commissioner's Office and Superior Court's decisions below—as well as the vagueness of the statutes at issue—only prove this point.

CONCLUSION

For all these reasons, the Superior Court erred when it affirmed the decision of the Commissioner's Office and held that the Network entered into contracts of insurance with its members. The Network does not provide its members with insurance. Accordingly, the Court should reverse the judgment for the Commissioner's Office.

I certify that this brief is in 14-point Times New Roman font and contains 7,862 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 15th day of September, 2022.

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DECLARATION OF SERVICE

I hereby certify that on September 15th, 2022, a copy of the foregoing ***Document*** and this ***Declaration of Service*** were served on the parties below as noted:

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I certify under penalty of perjury of the law of the State of Washington that the foregoing is true and correct.

Signed this 15th day of September, 2022 at Tacoma, WA

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September 15, 2022 - 4:31 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	57043-2
Appellate Court Case Title:	Armed Citizens' Legal Defense Network, Inc, App v. Office of Insurance Commissioner, Resp
Superior Court Case Number:	20-2-00723-2

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